IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 29TH MARCH 2007 / 8TH CHAITHRA 1929

SA.No. 769 of 1993()

AS.173/1987 of DISTRICT COURT,TRIVANDRUM
O.S.52 of 1982 OF III ADDL. MUNSIFF COURT.,
THIRUVANANTHAPURAM.

.....

APPELLANT: 3rd RESPONDENT/3RD DEFENDANT

FRANCIS KALATHRON D'CRUS, KARUNALAYAM
VALIYATHURA, TRIVANDRUM, BY POWER OF ATTORNEY
HOLDER HERMAN D'CRUS, (DIED)KARUNALAYAM, VALIATHURA,
TRIVANDRUM. (POWER OF ATTORNEY PRODUCED IN THE
LOWER COURT). (THE PRESENT POWER OF ATTORNEY HOLDER
HENRY PRIYAN D'CRUZ IS PERMITTED TO REPRESENT THE APPEAL
AS PER ORDER DATED 14/11/2000 IN CMP NO.2229/2000)

BY ADV. SRI.V.CHITAMBARESH
SMT.SINDHU MANOJ
KRISHNA PRASAD

RESPONDENTS: APPELLANTS & RESPONDENTS 1 & 4/DEFENDANTS

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1. SEBASTIAN D' CRUZ, ALIAS SUNNY D'CRUS
RESIDING AT NO.37, BAHAGIAN DUA KUALALAMPURA
MALAYSIA, REPRESENTED BY HIS ATTORNEY PAUL
ALBERT ROZARIO, ADVOCATE, BOMBAY
HIGH COURT, RESIDING AT FLAT NO.12,
BUILDING NO.161, KALINA, BOMBAY-29.
2. CHARLET D'CRUZ, HOUSE NO.22/5, SANAPADIA
LABOUR COLONY, PARADEEP, ORISSA.
3. JOANA D'CRUZ, BEDE VILLA, VALIATHOPPU
SHANGUMUKHOM, TRIVANDRUM (DIED) NO LRS
IMPLEADED.
(IT IS RECORDED BY THE MEMO C.F.2899/94 DT.16.6.94
AT THE RISK OF THE APPELLANT)

BY ADV. SRI.G.P.SHINOD FOR R1
SRI.G.UNNIKRISHNAN

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 29 / 3 / 2007 THE COURT ON 29/03/2007 DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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S.A. NO.769 OF 1993

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Dated this the 28th day of March, 2007

JUDGMENT

Third defendant in O.S.52/1982 on the file of Munsiff Court, Thiruvananthapuram is the appellant. First respondent plaintiff and second respondent is the first defendant and third respondent 4th defendant in the suit. Second defendant died before filing the second appeal. 4th respondent died during the pendency of the second appeal and as the presence of the legal heirs were not necessary, they were not impleaded. Admittedly 27 cents in survey No.2891 of Muttathara Village originally belonged to Dr.A. Grihary D'cruz. Plaint schedule property in O.S.52/1982 is the room of the godown bearing door No.T.C.41/1728. 4th defendant is his widow and first defendant and Josebel Albert are their daughters. Plaintiff is the husband of first defendant.Their marriage was solemnized on 20-5-1953. Paul Albert Rozario is the husband of

the other daughter Josebel Albert. At the time of marriage of the daughters, Grihary D'cruz, the father executed two dowry deeds whereunder the property was given in the name of the daughters and their respective husbands as streedhanam. Under Ext.A2 dowry deed dated 5.10.1128 the eastern half of the property with the godown therein was given to first defendant and the plaintiff. Similarly as per another dowry deed executed by the father in favour of the other daughter and her husband in 1124 M.E., the western half of the property with godown situate therein was given to Jospel Albert and her husband Paul Albert Rozario. Subsequently first defendant assigned her right over the property in favour of third defendant/appellant under Ext.A3 sale deed. But Ext.A3 was executed as if first defendant had right over the entire property including the western portion of the property transferred by the father in favour of Jospel and her husband. Contending that under Ext.A2 dowry deed plaintiff is also entitled to get equal right over the property, O.S.52/1982 was filed by the plaintiff. Contending that as he is

not a party to the said alienation and Ext.A3 was executed as if by the document first defendant is the absolute owner of the entire property and it is being transferred to third defendant, it was contended that Ext.A3 is void. Plaintiff sought a decree for declaration that Ext.A3 is void to the extent of the share of the plaintiff and for partition and separation of the plaint A schedule property into two equal shares and allotment of one such share to the plaintiff. Appellant along with second defendant filed a joint written statement admitting the marriage but contending that plaintiff deserted first defendant in 1959 and thereafter she remarried and is living with her second husband and there is only one godown and dowry deed in favour of the sister of the first defendant did not come into force and even if any right accrued on the strength of the document, it was lost by adverse possession and limitation and plaint schedule property was purchased by third defendant under Ext.A3 and plaintiff is not entitled to claim any share and in the property given as dowry husband will not get any right and

therefore the suit is to be dismissed. Learned Munsiff framed the necessary issues.

2. The sister of the first defendant along with her husband filed O.S.598/1976 seeking a declaration of their right over the western part of the property contending that as per the dowry deed in their favour the property belongs to the husband and wife and defendants have no right over the said property. That suit was jointly tried along with O.S.52/1982. Though evidence was jointly recorded, learned Munsiff marked the exhibits in O.S.598/1976 separately. No oral evidence was adduced in O.S.52/1982 and oral evidence was adduced only in the other suit. Learned Munsiff disposed both the suits by a common judgment. Relying on the provisions of Section 5 of the Travancore Christian Succession Act, learned Munsiff held that though Ext.A2 was executed in favour of both plaintiff and first defendant, plaintiff is only a trustee and did not derive any right over the property and therefore he is not entitled to seek partition. Holding that he is not entitled to any of the reliefs sought for, suit

was dismissed. A decree was granted in O.S.598/1976 upholding their case that as per the dowry deed plaintiffs therein got the right and defendants in the suit have no right over the western property and defendants including the appellant cannot claim any right over the western property under Ext.A3 sale deed. The judgment in O.S.598/1976 was challenged by appellant herein, who was the additional sixth defendant in that suit, in A.S.148/1987. The judgment in O.S.52/1982 was challenged in A.S.173/1987 by the plaintiff. Both the appeals were heard together. As per common judgment, learned District Judge allowed A.S.173/1987 and upheld the case of plaintiff and granted a preliminary decree directing partition of the plaint schedule property and granting a declaratory decree in respect of the share of the plaintiff. Confirming the decree and judgment in O.S.598/1976, A.S.148/1987 was dismissed. This Second Appeal is filed challenging the decree granted in A.S.173/1987. Challenging the decree and judgment in A.S.148/1987 appellant filed S.A.777/1993 which was subsequently dismissed for

default on 24.3.1997 and the judgment has become final.

3. The Second Appeal was admitted after formulating the following substantial questions of law.

1) Has the extension of Indian Succession Act to the T.C. State any bearing on the right of a Christian bride to her streedhanam property which has always been treated as her absolute property.

2) Is not the plaintiff in whose name Ext.A2 was so executed along with that of the first defendant, a mere trustee without any beneficial interest and if so whether plaintiff is entitled to the decree for partition?

3) Whether the suit is barred by adverse possession and limitation.

4. Learned counsel appearing for appellant and first respondent were heard.

5. Though appellant had raised a contention that dowry deed executed by Grihari D'Cruz in favour of the sister of first defendant the second plaintiff in O.S.598/1976 was not acted upon and under Ext.A2 dowry deed first defendant obtained

the entire property, in view of the decree in O.S.598 of 1976 which has now become final, appellant is not entitled to contend that sister of first defendant and her husband who are plaintiffs in O.S.598 of 1976 did not get right under the dowry deed executed by the father of first defendant in their favour. Appellant being an assignee of first defendant, could only claim the right which was obtained by first defendant under Ext.A2.

6. Arguments of learned counsel appearing for appellant was that though under Ext.A2 eastern property was given to first defendant and her husband, plaintiff was only a trustee of the Streedhanam property of first defendant and therefore plaintiff did not derive right over the property and under Ext.A3 entire right over the property covered under Ext.A2 now vests with the appellant. Case of plaintiff was that under Ext.A2 both first defendant and plaintiff have equal rights and under Ext.A3 only the one half right of first defendant vests with the appellant and plaintiff is entitled to the remaining half right,

which was granted by first appellate court. Learned counsel appearing for appellant relying on the decision of this court in **Vedamami Palavva v. Ummini Nadar Kochukrishnan and another (AIR 1974 Kerala 11) and Mathai Kunjamma v. Geevarghese Kochu Kirian (1984 KLT 128**) and relying on Section 5 of Travancore Christian Succession Act argued that as per the provisions of Travancore Christian Succession Act streedhanam is always treated as the exclusive property of the wife and husband is only treated as a trustee and therefore under Ext.A2 plaintiff did not derive any right and hence the decree is unsustainable. Learned counsel appearing for first respondent relying on decision of Supreme court in **Mary Roy & Others v. State of Kerala & others (1986 KLT 508)** argued that law as declared by Supreme court establish that with the coming into force of Part B States Laws Act, 1951, which came into force on 1/4/1951, Travancore Christian Succession Act, 1092 is repealed in its entirety and therefore relying on Section 5 of the repealed Act appellant is not entitled to raise a claim and the decisions relied on by the appellant

were basing on the provisions of Travancore Christian Succession Act and hence are not applicable and as rightly found by first appellate court plaintiff is entitled to get his half share separated.

7. A learned single Judge of this Court in **Vedamani Palavva v. Ummini Nadar Kochukrishnan and another (AIR 1974 Kerala 11)** another learned Single Judge in **Mathai Kunjamma's case (supra)** relied on Section 5 of Travancore Christian Succession Act and held that it is settled law that among the community of Travancore Christian there is a practice of giving streedhanam to the female children in lieu of her share in her father's property and streedhanam so given to the female children is her absolute property and though name of her husband is also shown in the document, he is only a trustee. The question is how far this decision could be followed, when very basis of the said decisions was taken away by the later pronouncement of law by Apex court in Mary Roy's case. Though learned counsel appearing for appellant argued that in Mary Roy's case Apex

Court was only considering the intestate succession and not streedhanam as provided under Section 5 of the Travancore Christian Succession Act, and so that decision does not apply to the case.

8. What was considered by Apex court in Mary Roy's case was the effect of Part B States Laws Act, 1951 in respect of the States Laws prevailing on the date of commencement of Part B States Laws Act. Supreme Court declared the law thus:

> "But admittedly there is nothing in Part B States Laws Act, 1951 expressly saving the Travancore Christian Succession Act 1092. The only argument urged on behalf of the respondents was that S.29 sub-s. (2) of the Indian Succession Act, 1925 had the effect of saving the Travancore Christian Succession Act, 1092 and the latter Act therefore continued to govern Indian christians in the territories of the former State of Travancore. Now this contention of the respondents might perhaps have required some

consideration, if the Travancore Christian Succession Act, 1092 had not been expressly repealed and an argument had been raised that by reason of the extension of the Indian Succession Act, 1925, there was implied repeal of the Travancore Christian Succession Act, 1092. Then perhaps an argument could have been advanced that though both Chapter II of Part V of the Indian Succession Act, 1925 and the Travancore Christian Succession Act, 1092 covered the same field and dealt with the same subject matter, namely, intestate succession among Indian Christians, there was no implied repeal of the Travancore Christian Succession Act, 1092 by the extension of Chapter II of Part V of of the Indian Succession Act 1925 and the continued operation of the Travancore Christian Succession Act 1092 was saved by S.29 sub-s.(2) of the Indian Succession Act, 1925. We very much doubt whether such an argument would

> have been tenable but in any event, in the present case, there is no scope for such an argument, since the Travancore Christian Succession Act, 1092 stood expressly repealed by virtue of S.6 of Part B States (Laws) Act, 1951."

The final conclusion reads;

> "We are therefore of the view that on the coming into force of Part B States (Laws) Act, 1951 Travancore Cochin Succession Act, 1092 stood repealed and Chapter II of Part V of Indian Succession Act, 1925 became applicable and intestate succession to the property of members of the Indian Christian community in the territories of the erstwhile State of Travancore was thereafter governed by Chapter II of Part V of the Indian Succession Act, 1925".

9. The result of the declaration of law by the Apex Court is that Travancore Christian Succession Act stood repealed by Part B States (Laws) Act in

its entirety. Hence relying on Section 5 of said repealed Act or the decisions rendered relying on the provisions of the said Act, appellant is not entitled to contend that under Ext.A2 the property exclusively belonged to first defendant or that plaintiff was only a trustee.

10. Though learned counsel appearing for appellant relying on Section 20 of Indian Succession Act argued that by virtue of Ext.A2,the husband will not get any right over the property of wife, on the facts and circumstances of this case and in the light of Ext.A2, Section 20 of the Act has no application. Section 20 provides that no person shall by marriage acquire any interest in the property of the person whom he or she marries or become incapable of doing any act in respect of his or her own property, which he or she could have done if unmarried. Argument of learned counsel appearing for appellant could have been accepted, if Ext.A2 is only in the name of first defendant and it was given as dowry and plaintiff as husband claimed a right over the property. If that be the case, Section 20 mandates that by virtue of his

status as husband alone, he is not entitled to acquire any interest in the property of the wife. But under Ext.A2 an equal right was given both first defendant wife and the plaintiff husband. Under Ext.A2 plaintiff is not claiming any right in the property of the wife. Property transferred under Ext.A2 is that of the father. First defendant is getting right over the property, only by virtue of Ext.A2. When Ext.A2 provides that the right transferred thereunder is equally to plaintiff and first defendant, Section 20 has no application and finding of first appellate court cannot be interfered on that ground also.

11. Learned counsel appearing for appellant then argued that Ext.A2 was not acted upon. But appellant has no case that Ext.A2 was not acted upon as such. Instead what was contended was that plaintiff did not accept Ext.A2 and therefore, he did not get any right. Fact that plaintiff married first defendant immediately after Ext.A2 is admitted. Fact that they were living together as husband and wife and children were born in that wedlock is also admitted. If that be the

case, if Ext.A2, which could only be treated as gift by the father to first defendant and plaintiff was accepted and acted upon, the alleged subsequent desertion by the wife or husband will not make any difference with regard to the validity of Ext.A2. First appellate court rightly found that under Ext.A2 both plaintiff and first defendant derived equal rights. Appellant under Ext.A3 obtained only the right of first defendant which is only half right over the plaint schedule property. Plaintiff is therefore entitled to get his share separated.

Appeal fails and is dismissed.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/uj

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006